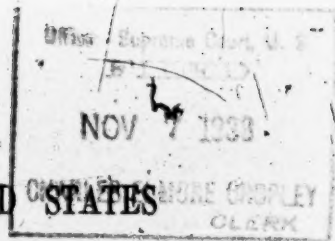


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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 462

POWERS HIGGINBOTHAM,

Appellant,

vs.

CITY OF BATON ROUGE, LOUISIANA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA.

STATEMENT AS TO JURISDICTION.

✓ EDWARD RIGHTOR,
✓ E. R. SCHOWALTER,
P. G. BORRON,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 462

POWERS HIGGINBOTHAM,

vs.

CITY OF BATON ROUGE,

Appellant,

Appellee.

**JURISDICTIONAL STATEMENT IN CONFORMITY
WITH RULE 12 OF THE SUPREME COURT OF
THE UNITED STATES.**

Petitioner and appellant in accordance with Rule 12 of the Supreme Court of the United States herewith files a definite statement disclosing the basis on which it is contended that the Supreme Court of the United States has jurisdiction to review the judgment of the Supreme Court of the State of Louisiana in the above numbered and entitled cause:

(1)

That on the 10th day of January in the year 1935 your appellant was the duly elected Commissioner of Public Parks and Streets for the City of Baton Rouge, Louisiana.

That the Legislature of the State of Louisiana by the provisions of Section 4 of Act 13 of the Third Extraordi-

nary Session of the Legislature of Louisiana for the year 1934, effective the 10th day of January, 1935, abolished said elective office, and all authority, powers and functions thereof transferred and vested in the office of the Mayor of the City of Baton Rouge with the provision therein contained, as follows:

“That the person now filling the office of Commissioner of the Department of Public Parks and Streets shall be entitled to enter the employ of the said City of Baton Rouge at a salary equal to that heretofore allowed by law to said person as Commissioner of the Department of Public Parks and Streets in the work under the said Mayor, and said person shall have the right to continue in said service during good behavior until the next general election of officers in said municipality.”

That petitioner and appellant's term of office as Commissioner of Public Parks and Streets for the City of Baton Rouge was for a term ending on the — day of November, in the year 1936, and that his salary as such Commissioner was the sum of five thousand and no/100 (\$5,000.00) dollars per annum.

That at a special meeting of the Commission Council of the City of Baton Rouge called and held on the 9th day of January, 1935, the following resolution was adopted:

“Be it ordained by the Commission Council of the City of Baton Rouge, La.: That under the provisions of Act No. 13 of the 3d. Extra Session of the Legislature of Louisiana of 1934, the office of the Commissioner of Public Parks and Streets having been abolished and all of the authority, powers and functions of that Department having been transferred to the Mayor, and the present incumbent of said Commissionership being entitled by said Act to enter the employ of the City in the work under the Mayor with the right to continue in said office during good behavior and until the next

regular municipal election, that therefore, Powers Higginbotham, present Commissioner of Public Parks and Streets be and he is hereby employed by the City of Baton Rouge, La., as Superintendent of Public Parks and Streets, under the Mayor of the City of Baton Rouge, La., at the same salary now provided for the Commissioner of Public Parks and Streets, his employment to continue during good behavior and until the next general election for municipal officers."

That petitioner and appellant accepted employment from the Commission Council of the City of Baton Rouge under the said resolution of the Commission Council of date the 9th day of January, 1935, as authorized by Section 4 of Act 13 of the Third Extraordinary Session of the Legislature of the State of Louisiana for the year 1934, and entered into the service of the City of Baton Rouge, and faithfully performed all duties required of him under his employment until the 22nd day of March, 1935.

That by Act 1 of the First Extraordinary Session for the year 1935 the Legislature of the State of Louisiana amended Section 4 of Act 13 of the Third Extraordinary Session of the Legislature of Louisiana for the year 1934 which Act authorized petitioner's contract of employment, as follows:

"(1) In the City of Baton Rouge, the office of Commissioner of the Department of Public Parks and Streets is hereby abolished, and all authority, powers and functions thereof are hereby transferred to and shall be exercised by and under the Commissioner of the Department of State Coordination and Public Welfare, as ex-officio Commissioner of Streets and Parks of said City, and in and for said City of Baton Rouge there is hereby created the Department of State Coordination and Public Welfare, the duties and authority of which shall include the administration of the public parks and streets of said City and arrangements necessary for said City to render to and be rendered by the State such facilities and services as are mutually

necessary to same as may be authorized by law and said City of Baton Rouge; there shall be a Commissioner of the said Department of State Coordination and Public Welfare, who shall be ex-officio Commissioner of Streets and Parks, and who shall receive a salary of Five Thousand (\$5,000.00) Dollars per year, in charge of said Department, and who shall be elected at the regular municipal election in and for said City, and pending said election the said office shall be filled by appointment of the Governor by and with the advice and consent of the Senate. The provision of this section heretofore enacted requiring the employment of the person theretofore exercising the functions of Commissioner of the Department of Streets and Parks be and the same is hereby repealed."

That the Mayor and Commission Council of the City of Baton Rouge, acting under the provision of said Act 1 of the First Extraordinary Session of the Legislature of Louisiana for the year 1935 on the 22nd day of March, 1935, by formal action taken at a special meeting, terminated appellant's contract of employment and discharged appellant without cause. That appellant was at all times ready and willing and able to perform and carry out his contract of employment with the City of Baton Rouge.

That appellant in his petition filed in the trial court in his suit against the City of Baton Rouge to recover the sum of \$7,957.76 under said contract of employment and by brief and argument in the trial court and in the Supreme Court of the State of Louisiana, alleged, urged and contended that the provisions of said Act 1 of the First Extraordinary Session of the Legislature of Louisiana for the year 1935 and the formal action taken by the Commission Council of the City of Baton Rouge of date March 22, of the year 1935, terminating appellant's contract of employment and discharging appellant without cause, constituted an impairment and a violation of his contract rights

under the provisions of Section 15, Article 4 of the Constitution of the State of Louisiana and of Section 10 of Article 1 of the Constitution of the United States.

That the Supreme Court of the State of Louisiana rendered final judgment in the case, affirming the judgment of the lower court sustaining an exception of no cause or right of action and dismissing plaintiff and appellant's suit. That the decision of the Supreme Court of Louisiana in the case was based on the holding that the termination without cause of appellant's contract of employment by the Commission Council of the City of Baton Rouge, as authorized by said Act of the Legislature of the State of Louisiana, was a legitimate exercise of police power, therefore, appellant's contract rights were not protected by the said provisions of the Constitution of the United States and of the Constitution of the State of Louisiana; further, that appellant's status under said contract of employment was that of a public officer of the City of Baton Rouge, or an employee performing a public function, and that the Legislature and the Commission Council of the City of Baton Rouge had the authority to terminate said contract at will and without cause.

That the Supreme Court of Louisiana is the highest court of the State of Louisiana in which a decision of the case could be had where is drawn in question the validity of a statute of the State and an ordinance and the action of a municipal Corporation on the ground that such act, ordinance and action being repugnant to the Constitution of the United States, and that the Supreme Court of the United States is vested with jurisdiction to review such judgment under the provision of Paragraph (b), Section 344, Title 28, United States Code Annotated, Section 237 Judicial Code; *Nashville, Chattanooga and St. Louis Railway Co. v. White*, 278 U. S. 456, 73 L. Ed. p. 452; *Great*

Northern Railway Company v. Minnesota, 278 U. S. 503, 73 L. Ed. p. 477; *Hall v. State of Wisconsin*, 103 U. S. 5, 26 L. Ed. p. 302.

Attached hereto is a copy of the decision of the Supreme Court of the State of Louisiana rendered in the case. The judgment of the Supreme Court of La. hereby appealed from became final August 5, 1938, and this application was presented on October 7th, 1938.

Respectfully submitted,

(Sgd.)

EDWARD RIGHTOR,

(Sgd.)

E. R. SCHOWALTER,

(Sgd.)

P. G. BORRON,

Attorneys for Petitioner and Appellant.

EXHIBIT "A"**SUPREME COURT OF LOUISIANA.**

No. 33,991.

POWERS HIGGINBOTHAM*v.***CITY OF BATON ROUGE.**

Appeal from the Nineteenth District Court, for the Parish
of East Baton Rouge.

A. L. Ponder, Judge.

Opinion and Judgment Supreme Court.

Ponder, J., recused.

O'NIELL, C. J.:

The plaintiff is appealing from a judgment dismissing his suit on an exception of no cause or right of action. He claims that, having been employed by the Commission Council of the City of Baton Rouge, on January 9, 1935, as Superintendent of Public Parks and Streets, for a term to continue until the next day after the first Monday in November, 1936, at a salary of \$5,000 per year, he was discharged by the Commission Council, without just cause, on March 22, 1935, and was paid his salary only to the end of that month. Hence he sues for the balance of the salary that he would have earned if he had been allowed to continue in his employment to the end of his term. The amount is \$7,957.76.

The facts of the case are stated completely in the plaintiff's petition. The city of Baton Rouge has a commission form of government, adopted in 1914, under the provisions of Act No. 207 of 1912. The authority of the Commission Council is divided among three departments, namely, (1) the Department of Public Health and Safety, (2) The De-

partment of Finance and (3) the Department of Public Parks and Streets. There is a commissioner elected for each department, the Mayor being ex officio Commissioner of Public Health and Safety. In the Act No. 207 of 1912, in section 20, all of the powers and authority conferred upon the city by its charter, being Act No. 169 of 1898, or by any other law, not inconsistent with the provisions of Act No. 207 of 1912, are declared reserved to the city unimpaired, to be exercised by the Mayor and Commission Council elected under the provisions of the Act of 1912. In Section 47 of Act No. 169 of 1898, as amended by Act No. 20 of 1921, the terms of office of the members of the Commission Council were fixed at four years, and the date of their election was declared to be the first Tuesday in April, every four years, commencing on the first Tuesday in April, 1927. Powers Higgenbotham, who is the plaintiff in this suit, was elected Commissioner of Public Parks and Streets. In the election held on the first Tuesday in April, 1931, for a term of four years, beginning on the fourth day of May, 1931, and at a salary of \$5,000 per annum. He was inducted into office on the first Monday in May, 1931, for a term which was to expire on the first Monday in May, 1935. But the Legislature, by Act No. 41 of the Second Extraordinary Session of 1934, postponed the date for the election of officers of the City of Baton Rouge from the first Tuesday in April, 1935, to the Tuesday next following the first Monday in November, 1936. Thus the term of office of Powers Higgenbotham as Commissioner of Public Parks and Streets was extended to the Tuesday next following the first Monday in November, 1936. But, in the Third Extraordinary Session of 1934, the Legislature adopted an act, being Act No. 13 of that session, providing a form of government for certain cities in Louisiana, and in the 4th session of the act the office of Commissioner of Public Parks and Streets for the City of Baton Rouge was abolished, and all of the authority and functions theretofore belonging to that office were transferred to the Mayor of the city. In the same section of the act the Legislature created what was termed the Department of State Coordination and Public Welfare, with authority to arrange for the facilities and services deemed

necessary to be rendered by the city and the state for their mutual benefit. The statute provided for the election of a Commissioner of the Department of State Coordination and Public Welfare, at a salary of \$5,000 per year, and provided that the commissioner should be appointed by the Governor until the next regular election of the Commission Council. In the same section of the act the Legislature declared that the person then holding the office of Commissioner of Public Parks and Streets,—meaning Powers Higgenbotham,—should be entitled to enter the employ of the city under the Mayor, and should have the right to continue in that service during good behavior and until the next general election of the municipal officers, at the same salary that he was receiving then as Commissioner of the Department of Public Parks and Streets. That provision of the statute was in these words.

“Provided that the person now filling the office of Commissioner of the Department of Public Parks and Streets of said City shall be entitled to enter the employ of the said City of Baton Rouge, at a salary equal to that heretofore allowed by law to said person as the Commissioner of the Department of Public Parks and Streets, in the work under the said Mayor and said person shall have the right to continue in said service during good behavior until the next general election of officers in said municipality.”

Act No. 13 of the Third Extraordinary Session of 1934, became effective on the 10th day of January, 1935. Accordingly, on the 9th day of January, 1935, the Commission Council adopted an ordinance declaring that, whereas, by Act No. 13 of the Third Extraordinary Session of 1934, the Legislature had abolished the office of Commissioner of Public Parks and Streets, and had transferred all of the authority and functions of that department to the Mayor, and at the same time had declared that the then incumbent Commissioner of Public Parks and Streets was entitled to enter the employ of the city under the Mayor, and to remain in that employment until the next municipal election, therefore, Powers Higgenbotham, the then incumbent Commissioner of Public Parks and Streets, was thereby

employed by the City of Baton Rouge, as Superintendent of Public Parks and Streets, under the Mayor of the City, at the same salary that he was receiving as Commissioner of Public Parks and Streets, and for the term of employment continuing during good behavior and until the next general election of municipal officers. Mr. Higgenbotham promptly accepted the employment and entered upon the discharge of his duties, with the right and intention of continuing in the employment until the Tuesday next following the first Monday in November, 1936.

The Legislature, in the First Extraordinary Session of 1935 adopted an act, being Act No. 1 of that session, amending Section 4 of Act No. 13 of the Third Extraordinary Session of 1934, so as to transfer the authority and functions of the Department of Public Parks and Streets from the Mayor to the Commissioner of the Department of State Coordination and Public Welfare, and so as to make that Commissioner, ex. officio, Commissioner of Public Parks and Streets; and, in this act of the First Extraordinary Session of 1935, the Legislature declared:

"The provision of this section (Section 4 of Act No. 13 of the Third Extraordinary Session of 1934) heretofore enacted requiring the employment of the person theretofore exercising the functions of Commissioner of the Department of Streets and Parks (shall) be and the same is hereby repealed."

Act No. 1 of the First Extraordinary Session of 1935 went into effect on the 22nd day of March, 1935. On that day the Commission Council for the City of Baton Rouge, recognizing that the employment of Powers Higgenbotham was terminated by Act No. 1 of the First Extraordinary Session of 1935, adopted an ordinance declaring that the city was then without authority to retain Mr. Higgenbotham in his employment, and hence, that the employment was at an end. He was paid his salary to the end of that month.

The plaintiff's contention is that Act No. 1 of the First Extraordinary Session of 1935 cannot have the effect of destroying the contract of employment between him and the City of Baton Rouge, because that would be violative of

Section 15 of Article 4 of the Constitution of Louisiana, forbidding the Legislature to pass any law impairing the obligation of a contract, and would be violative of Section 10 of Article 1 of the Constitution of the United States, forbidding the States to pass any law impairing the obligation of a contract. Hence the plaintiff contends that the Commission Council discharged him without just cause; before the expiration of his term of employment; and therefore, under the provisions of article 2749 of the Civil Code, the city is obliged to pay him the balance of the salary that he would have earned if he had been allowed to serve to the end of his term of employment. The plaintiff relies mainly upon the doctrine of the decision in *Hall v. Wisconsin*, 103 U. S. (13 Otto) 5, 26 L. Ed. 320. The City of Baton Rouge, on the other hand, relies upon the decision in *Newton v. Board of Commissioners of Mahoning County, Ohio*, 100 U. S. 548, 25 L. Ed. 710. Our opinion is that the present case is governed by the doctrine of *Newton v. Board of Commissioners*, and not by the decision in *Hall v. Wisconsin*. The position in which Powers Higgenbotham was employed was in the nature of a public office, in that the duties and functions of the employee were governmental or administrative duties and functions. In *Hall v. Wisconsin*, the contract that was declared to be within the protection of Section 10 of Article 1 of the Constitution of the United States was a contract to make a geological, mineralogical and agricultural survey of the State. In the opinion rendered in the case it was said, with reference to the so-called "Commissioners" employed by the Governor to do the work, "Their duties were specifically defined, and were all of a scientific character." The duties or functions of the employees—called commissioners—were not governmental or administrative duties or functions, in any sense. They were just such functions or duties as the surveyors or commissioners would have had to perform if their contract had been made with an individual or with a private corporation, instead of the State.

In *Newton v. Board of Commissioners of Mahoning County* it was held that the contract clause in the Constitution had application only to cases where the State laid

aside her sovereignty and entered into a contract such as an individual might enter into. The author of the opinion in that case quoted from Chief Justice Marshall's opinion in the Dartmouth College Case,—The Trustees of Dartmouth College *v.* Woodward, 4 Wheat. 518, 4 L. Ed. 629,—in support of the proposition that the contract clause in the Constitution has no application where the statute in question is a public law having reference to the general welfare. And the author of the opinion in the Newton Case distinguished that case from the Dartmouth College Case, thus:

“The principle there laid down (in the Dartmouth College Case), and since maintained in the cases which have followed and (have) been controlled by it, has no application where the statute in question is a public law relating to a public subject within the domain of the general legislative power of the State, and involving the public rights and public welfare of the entire community affected by it.”

Counsel for the appellant in this case cite the following cases decided by this court: *State v. Judge Bermudez*, 12 La. 352; *Reynolds v. Baldwin*, 1 La. Ann. 162; *State ex rel. Henry v. Mayor and Administrators of City of New Orleans*, 29 La. Ann. 863; *New Orleans, Canal & Banking Company v. City of New Orleans*, 30 La. Ann. 1371; and *Shreveport Traction Co. v. City of Shreveport*, 122 La. 1, 47 So. 40, 129 Am. St. Rep. 345. These decisions merely restate the prohibition in the Constitution, that the Legislature is forbidden to enact any law impairing the obligation of a contract. None of the cases cited is quite like the present case in point of fact. With regard to the case of *Shreveport Traction Co. v. City of Shreveport*, we observe that, in *State v. City of New Orleans*, presenting the same question, 151 La. 31, 91 So. 536, the court referred to the *Shreveport Traction Company's Case* thus:

“The Attorney General cites the decision in *Shreveport Traction Co. v. City of Shreveport*, 122 La. 1, 47 So. 40, 129 Am. St. Rep. 345, as being opposed to the doctrine stated; but the decision upon which the expression in that case was

founded, (*Detroit v. Detroit Citizens' Street R. Co.* 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592), was not appropriate, as is explained in *Milwaukee v. Railroad Commission*, 283 U. S. 181, 35 Sup. Ct. 820, 59 L. Ed. 1254."

The reason why the contract clause in the Constitution is not applicable to contracts of employment of persons to perform governmental functions is that the Legislature is forbidden to make an irrevocable surrender of any of the police power of the State. It is so declared in Section 18 of Article XIX of the Constitution of Louisiana—thus: "The exercise of the police power of the State shall never be abridged." Hence the contract clause in the Constitution does not interfere with the authority of the Legislature to repeal at any time any law under which an individual has been employed to perform governmental functions, and, by such repeal, to put an end to the contract of employment.

The reason why the Commission Council employed Mr. Higgenbotham to serve as Superintendent of Public Parks and Streets until the next general election of the municipal officers,—as stated in the ordinance dated January 9, 1935,—was that, by the provisions of Act No. 13 of the Third Extraordinary Session of 1934, Mr. Higgenbotham had "the right to continue in said office during good behavior and until the next regular municipal election."

The question whether that provision in Act No. 13 of the Third Extraordinary Session of 1934 might have been deemed unconstitutional on the ground that the appointing of a particular individual to fill a particular office or position is not a legislative function, did not arise, because both the city and Mr. Higgenbotham acquiesced in that provision of the statute. But, when that provision of the statute was repealed, by Act No. 1 of the First Extraordinary Session of 1935, the Commission Council was permitted—if not obliged—to discontinue the employment of Mr. Higgenbotham. In fact, by the terms of Act No. 1 of the First Extraordinary Session of 1935, all of the governmental functions that were exercised originally by the Commissioner of Public Parks and

Streets, under the provisions of Act No. 207 of 1912,—and that were transferred to the office of the Mayor by the provisions of Section 4 of Act 13 of the Third Extraordinary Session of 1934,—were transferred to the office of the Commissioner of the Department of State Coordination and Public Welfare. And it was because of this final transfer, of the functions and authority that belonged originally to the Department of Public Parks and Streets, that the Legislature, in Act No. 1 of the First Extraordinary Session of 1935, emphatically repealed the provision in Section 4 of Act No. 13 of the Third Extraordinary Session of 1934 “requiring the employment of the person theretofore exercising the functions of Commissioner of the Department of Streets and Public Parks.”

Conceding, however, for the sake of argument that the amendment of Section 4 of Act No. 13 of the Third Extraordinary Session of 1934, by Act No. 1 of the First Extraordinary Session of 1935, did not of itself put an end to the employment of Mr. Higgenbotham as Superintendent of Public Parks and Streets, the Act No. 1 of the First Extraordinary Session of 1935 certainly had the effect of permitting the Commission Council of the City of Baton Rouge to put an end to the employment. By the provisions of Section 20 of Act 207 of 1912, all of the powers and authority that were conferred by the original charter or any city that afterwards adopted the commission form of government were reserved to the city, to be exercised by the Mayor and council selected under the provisions of the act of 1912. In Section 7 of the charter of the City of Baton Rouge (Act No. 169 of 1898) it is provided that the “employees” of the city are removable as thereafter specified. In Section 52 of the act, as amended by Act No. 249 of 1914, it is declared: “All officers elected by the Council shall be removable by the Council at pleasure.” In Section 8 of Act 207 of 1912, it is declared that any official or assistant elected or appointed by the Commission Council may be removed from office at any time by a vote of the majority of the members of the Council, except as herein otherwise provided. There is no exception, elsewhere in the statute, that might

be applicable to this case. This general rule, that a municipal council may remove at any time any official appointed or elected by the Council, or anyone employed by the Council to perform governmental functions, was recognized in the case of *Kirkpatrick v. City of Monroe*, 157 La. 645, 102 So. 822.

In *State ex rel. Loeb, Mayor of Opelousas, v. Jordan*, 149 La. 313, 89 So. 15, the defendant, Jordan, who was employed for a fixed term by the municipal council, as superintendent of the electric light and waterworks plant, at a stated salary, was discharged before the expiration of his term of employment, for cause, but without being given a hearing, such as he was entitled to under an ordinance of the city. He refused to surrender his position, and the Mayor brought injunction proceedings against him. The judge of the District Court gave judgment against Jordan, on the pleadings, declaring him discharged from his employment, and enjoining him from interfering with the management or superintendence of the electric light and waterworks plant. On appeal the judgment was reversed. We observed, in rendering our opinion in the case, that the theory on which the judge of the district court decided the case as he did, on the pleadings, was that Jordan's only recourse was to sue the city, under the provisions of article 2749 of the Civil Code, for the unpaid balance of the salary that he would have earned if he had been allowed to continue in his employment to the end of the term for which he was employed. But we held that Jordan's position or employment, as superintendent of the electric light and waterworks plant, was of the character of a municipal office, and hence we held that article 2749 of the Civil Code was not applicable to such an employee.

A suit brought by a discharged employee, claiming that he was discharged without cause, before the expiration of the term for which he was employed, and claiming, therefore, under authority of article 2749 of the Civil Code, the balance of the salary that he would have earned if he had been allowed to serve to the end of his term of employment, is, in its very nature, an action for damages for breach of con-

tract. There is no good reason why the city of Baton Rouge, in this case, should be held liable in damages for the alleged breach of a contract of employment which the city was compelled by an act of the Legislature to consent to, and which the city was compelled by another act of the Legislature to put an end to. Our conclusion, therefore, is that the judgment appealed from is correct.

The judgment is affirmed.

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